

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DIAMOND TOWN TIRE PROS &)
AUTO CARE, LLC and NUCAR)
MIDDLETOWN, LLC,)

Appellants,)

v.)

C.A. No. N22A-05-010 PRW

DELAWARE DEPARTMENT OF)
NATURAL RESOURCES AND)
ENVIRONMENTAL CONTROL,)

Appellee.)

Submitted: March 1, 2023

Decided: April 17, 2023

ORDER

*Upon Delaware Department of Natural Resources and Environmental Control's
Motion to Dismiss,*

DENIED.

(1) Diamond Town Tire Pros & Auto Care (“Diamond Town”) and NUCAR Middletown, LLC (“NUCAR” and together with Diamond Town, “Appellants”) have taken an appeal from an Environmental Appeals Board (“EAB”) decision and final order. Appellee Delaware Department of Natural Resources and Environmental Control (“DNREC”) has moved to dismiss that appeal. DNREC’s sole argument is that if an appeal of an EAB decision and final order is not wholly “perfected” within the 30-day time frame mentioned in 7 *Del.*

C. § 6009(a), then this Court lacks jurisdiction to hear and *must* dismiss such appeal.¹ For the reasons now explained, DNREC’s motion to dismiss this appeal is **DENIED**.

(2) On Thursday, May 12, 2022, Appellants filed a Notice of Appeal from an April 13, 2022 decision and final order of the EAB.² In addition to the Notice of Appeal, Appellants docketed the EAB decision and final order, case information sheet, praecipe, and writs for citation on appeal to the EAB and DNREC.³ Those writs for citation on appeal were sent to the New Castle Sheriff’s Office, but the addresses listed in the praecipe were the entities’ Dover locations.⁴ Four days later, on May 16, 2022, Appellants re-filed their writs for citation on appeal with the Kent County Sheriff’s Office.⁵

(3) On June 8, 2022, DNREC’s counsel emailed Appellants’ counsel inquiring about certain “compliance items and the payments.”⁶ Appellants’ counsel emailed DNREC’s counsel later that same day and noted, without further explanation, “[t]he matter has been appealed.”⁷ Thereafter, the record was filed

¹ DNREC’s Suppl. Ltr. at 1, Nov. 17, 2022 (D.I. 18) (“[I]f the appeal was not timely perfected, this Court is without jurisdiction over the case and the motion to dismiss must be granted.”).

² See Notice of Appeal at 1-2, May 12, 2022 (D.I. 1).

³ D.I. 1.

⁴ *Id.*

⁵ See Refiled Writs for Citation on Appeal, May 16, 2022 (D.I. 2 & 3).

⁶ Mot. to Dismiss, Ex. A at 1, Aug. 29, 2022 (D.I. 10).

⁷ *Id.*

with this Court and a briefing schedule was set.⁸

(4) On August 29, 2022, DNREC moved to dismiss this appeal arguing that Appellants hadn't "perfected" their appeal within the statutorily proscribed period and this Court, therefore, had no jurisdiction over the matter.⁹ On November 16, 2022, the Court heard oral argument and requested supplemental briefing on the issues raised during the hearing.¹⁰

(5) In its motion to dismiss, DNREC insists that because Appellants did not "perfect" their appeal within 30 days, the appeal must be dismissed.¹¹ To be more specific, DNREC says Appellants failed to perfect their appeal in four ways: (i) "Appellants have never mailed a copy of the notice of appeal to the undersigned [DNREC] counsel as required by Rule 72(c)"; (ii) "Appellants [didn't] file the required certificate of mailing"; (iii) "the writ of citation was issued to DNREC at a different location than where undersigned [DNREC] counsel is located"; and (iv) the writs for citation were issued "without an accompanying writ to the Attorney General as required by 10 *Del. C* § 3103(c)."¹²

⁸ See D.I. 7, 9.

⁹ Mot. to Dismiss ¶ 11.

¹⁰ See Nov. 16, 2022 Oral Arg. Tr. at 13 (D.I. 20). That argument was heard and the instruction issued by another judge of this Court. The matter was recently transferred to the undersigned after the filing of the supplementary briefing and docketing of the argument transcript. D.I. 21.

¹¹ Mot. to Dismiss ¶¶ 11-13.

¹² *Id.* ¶ 13.

(6) In its supplemental brief, DNREC—as yet another ground in support of its jurisdictional argument—also asserts that Appellants failed to comply with 29 Del. C. § 10145.¹³

(7) “[T]he power of an appellate court to exercise jurisdiction rests upon the perfecting of an appeal within the time period fixed by statute.”¹⁴ Here, 7 Del. C. 6009(a) provides that: “[a]ny [EAB] appeal shall be perfected within 30 days of the receipt of the written opinion of the Board.”¹⁵ While the statute does not define what “perfected” means, the Delaware Supreme Court has stated generally, “[t]he filing of a notice of appeal within the prescribed period . . . confers jurisdiction on the appellate court, which will not dismiss the appeal for a defect that does not result in substantial prejudice to a party in interest.”¹⁶ So as long as the Notice of Appeal is timely filed in a matter, any technical deficiency with the

¹³ DNREC’s Suppl. Ltr. at 1-2.

¹⁴ *PNC Bank, Del. v. Hudson*, 687 A.2d 915, 916 (Del. 1997) (citing *Fisher v. Biggs*, 284 A.2d 117 (Del. 1971)).

¹⁵ DEL. CODE ANN. tit. 7, § 6009(a) (2022).

¹⁶ *Preston v. Bd. of Adjustment of New Castle Cty.*, 772 A.2d 787, 791 (Del. 2001) (citing *State Personnel Comm’n v. Howard*, 420 A.2d 135, 138 (Del. 1980)). The statute at issue in *Preston* contains the phrase “presented within 30 days.” *Id.* at 789 n.2 (citing DEL. CODE ANN. tit. 9, § 1314(a)). While the statute at issue here reads “perfected within 30 days.” DEL. CODE ANN. tit. 7, § 6009(a) (2022). No matter. The *Preston* Court ascribed the same statutory meaning to the words “present” and “perfect” when it found a technical violation will not deprive a court of jurisdiction so long as notice of an appeal had been timely filed. *Preston*, 772 A.2d at 791 (“Generally, if a party *fails to perfect an appeal* within the statutorily mandated period, a jurisdictional defect results, thereby preventing the appellate court from exercising jurisdiction. The *filing of a notice of appeal within the prescribed period, however, confers jurisdiction on the appellate court*, which will not dismiss the appeal for a defect that does not result in substantial prejudice to a party in interest.” (emphasis added) (citations omitted)).

accompanying documents will not strip this Court of jurisdiction to hear it.

(8) It is clear that the Appellants' Notice of Appeal was timely filed.¹⁷

The issue is with the accompanying documents: (i) the writ for citation on appeal was sent to the wrong county's sheriff, (ii) Appellants failed to contemporaneously notify DNREC's counsel as provided for by this Court's Rule 72,¹⁸ and (iii) Appellants failed to also certify the mailing of their notice of appeal as provided for under Rule 72.¹⁹

(9) These are not failure-to-timely-file-with-the-Court issues. They are, at best, Rule 72 deficiencies.²⁰ And not all Rule 72 deficiencies necessarily deprive the Court of jurisdiction and mandate dismissal; they may instead expose the

¹⁷ See Notice of Appeal (filed May 12, 2022 at 2:18 pm EDT via File & Serve Xpress).

¹⁸ Del. Super. Ct. Civ. R. 72(c) ("The notification of a party shall be given by mailing a copy of the notice of appeal to the party's attorney of record . . .").

¹⁹ *Id.* ("At the same time that the appeal is filed, appellant shall mail copies of the notice of appeal to all parties to the appeal and to the proceeding below, and file a certificate of such mailing together with the notice of appeal with the Prothonotary.").

²⁰ DNREC's protestations of some separate statutory violations supporting dismissal are unavailing. The first statute it cites governs writs of summons, not writs of certification on appeal. See DEL. CODE ANN. tit. 10, § 3103(c) (2022). The second—29 *Del. C.* § 10145—provides: "No petition, appeal or other application for relief of the Court shall be considered as having been taken or made until it has been filed with the Prothonotary and served upon the agency *in accordance with the rules of the Court.*" DEL. CODE ANN. tit. 29, § 10145 (2022) (emphasis added). Because service is controlled by "the rules of the Court"—here, this Court's Civil Rule 72—there is no independent statutory ground for dismissal. *Id.*; Del. Super. Ct. Civ. R. 72 (providing rules for appealing decisions of certain boards). Rather, the Court examines an appellee's dismissal prayer under Rule 72. See, e.g., DEL. CODE ANN. tit. 10, § 561 (2022) (providing that even in instances where there may be seeming discord between them, this Court's promulgated civil rules "shall, after they have taken effect, supersede all statutory provisions in conflict or inconsistent therewith").

appellant to the possibility of permissive dismissal.²¹

(10) In deciding whether dismissal is appropriate, the Court decides whether “the level of egregiousness” of any Rule 72 violation is so high that it “overcome[s] the interest of justice in deciding [the] matter on its merits.”²² Little prejudice can be divined from this record.

(11) The corrected writs for citation on appeal were filed two business days after the earlier mistaken writs were filed. Within a month of the Notice of Appeal’s docketing, DNREC counsel had actual knowledge of the appeal. To the extent that Appellants failed to contemporaneously notify DNREC counsel and file the rule-prescribed certificate of mailing, those omissions are not so egregious as to overcome the interest of justice in deciding Appellants’ case on its merits. Put simply, dismissal is neither required nor called for here.

(12) In sum, Appellants docketed their Notice of Appeal within 30 days but failed to comply with certain portions of Rule 72. Appellants’ docketing of their appeal vested this Court with jurisdiction to hear it. Now, when Appellants

²¹ *Andreason v. Royal Pest Control*, 2013 WL 1305339, at *4 (Del. Super. Ct. Mar. 19, 2013), *aff’d*, 72 A.3d 115 (Del. 2013). *See* Del. Super. Ct. Civ. R. 72(i) (providing the Court “*may* order an appeal dismissed, sua sponte, or upon a motion to dismiss by any party” and that “[d]ismissal *may* be ordered . . . for failure to comply with any rule, statute, or order of the Court or for any other reason deemed by the Court to be appropriate.” (emphasis added)). To the extent that any Rule 72 deficiency could be deemed a § 10145 violation, the Court finds that Appellants have now complied with Rule 72 and thus satisfied § 10145. *See* n.20, *supra*.

²² *Andreason*, 2013 WL 1305339, at *4.

failed to comply with all requirements under Rule 72, they did indeed risk a grant of permissive dismissal under Rule 72(i). But on the facts here, the Court finds permissive dismissal under Rule 72(i) is not warranted.

(13) Accordingly, DNREC's motion to dismiss is **DENIED**.

IT IS SO ORDERED.

A handwritten signature in blue ink, appearing to read 'Paul R. Wallace', is written above a horizontal line.

Paul R. Wallace, Judge